Frank Edward Noah v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R3-14-16 OF 1997
NIK HASHIM J
22 JULY 1998

Revenue Law *— Income tax — Exempt income — Compensation payment for loss of employment — Period of employment of non-resident in Malaysia was less than 60 days — Whether compensation payment was income which qualified for tax exemption — Income Tax Act 1967 Sch 6 para 21*

The appellant, a British national, was employed in two Malaysian companies in 29 August 1989. However, his employment ended on 15 October 1989 after he had been employed for only 44 days, for which period he was not paid any salary. He was to receive a termination settlement of RM700,000 ('the compensation payment'). The appellant left Malaysia on 16 October 1989 and was assessed to tax on the compensation payment. He appealed. The Special Commissioners of Incom eTax confirmed the assessment after holding that the compensation payment did not qualify for tax exemption under para 21 of Sch 6 to the Income Tax Act 1967 ('the Act'). Learned counsel for the appellant contends that the compensation payment is income from an employment by virtue of s 13(1)(e) of the Act. He further submitted that since the period of employment was exercised by the appellant in Malaysia for less than 60 days and the appellant was at all material times a non-resident, the income from that employment must necessarily be for the same period and accordingly, the appellant therefore qualified for tax exemption under para 21 of Sch 6.

Held, dismissing the appeal with costs:

The compensation payment, being compensation for loss of employment, was not made in respect of employment or in respect of having or exercising the employment. Therefore, the compensation payment was not income which qualified for tax exemption under para 21 (see p 208G–I).

[**Bahasa Malaysia summary**

Perayu, seorang rakyat British, digaji di dua buah syarikat Malaysia pada 29 Ogos 1989. Namun demikian, pekerjaannya tamat pada 15 Oktober 1989 seleps digaji hanya untuk 44 hari, yang mana selama tempoh itu ia tidak dibayar apa-apa gaji. Ia telah menerima penyelesaian penamatan sebanyak RM700,000 ('bayaran pampasan'). Perayu meninggalkan Malaysia pada 16 Oktober 1989 dan dikenakan cukai atas bayaran pampasan. Dia merayu. Pesuruhjaya Khas Cukai Pendapatan mengesahkan taksiran selepas memutuskan bahawa

bayaran pampasan tidak layak untuk pengecualian cukai di bawah perenggan 21 Jadual 6 Akta Cukai Pendapatan 1967 ('Akta tersebut'). Peguam terpelajar perayu berhujah bahawa bayaran pampasan adalah pendapatan daripada pekerjaan disebabkan oleh s 13(1)(e) Akta tersebut. Dia selanjutnya berhujah bahawa memandangkan jangkamasa pekerjaan dilaksanakan oleh perayu di Malaysia kurang daripada 60 hari dan perayu pada semua masa material bukanlah penetap, pendapatan daripada pekerjaan itu mestilah untuk jangkamasa yang sama dan oleh itu, perayu layak mendapat pengecualian cukai di bawah perenggan 21 Jadual 6.

Diputuskan, menolak rayuan dengan kos:

Bayaran pampasan, yang merupakan pampasan untuk kehilangan penggajian, tidak dibuat berkenaan dengan pekerjaan atau berkenaan dengan mempunyai atau melaksanakan pekerjaan. Maka, bayaran pampasan bukanlah pendapatan yang layak untuk pengecualian cukai di bawah perenggan 21 (lihat ms 208G–I).]

Notes

For cases on exempt income, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1839–1840.

Case referred to

H v Comptroller of Inland Revenue [1974] 2 MLJ 135 (refd)

Legislation referred to

Income Tax Act 1967 ss 13(1)(e), 83(5), 127, Sch 6 paras 21, 22

CT Tan (*Kington & Tan*) for the appellant.

Hazlina Hussain (Legal Officer, Inland Revenue Board) for the respondetn.

Cur Adv Vult

Nik Hashim J: The appellant, a British national, was offered employment as Chief Executive Officer of Multi-Purpose Holdings Bhd, Dunlop Estates Bhd and Bandar Raya Developments Bhd (collectively referred to as 'the employer companies') through three letters all dated 29 August 1989. The appellant accepted the offer. However, his employment ended on 15 October 1989 after he had been employed for only 44 days, for which period he was not paid any salary. In three similar letters all dated 13 October 1989, the employer companies referred to the appellant's desire to resign from their employment; and they confirmed their agreement to compensate him with a 'mutually-agreed termination settlement' of

A RM700,000 ('the compensation payment'). Of this amount, a total sum of RM455,000 was paid to the appellant while the balance of RM245,000 was retained by the employer companies for tax purposes under s 83(5) of the Income Tax Act 1967 ('the Act').

The appellant left Malaysia on 16 October 1989. As such, he was in
B Malaysia for a total period of less than 60 days in the basis year 1989. It is an agreed fact that he was not a resident for Malaysia tax purposes for the basis year 1989. The appellant was assessed to tax on the compensation payment for the year of assessment 1990 through a notice of assessment dated 11 February 1991 which showed tax payable amounting to RM265,000. He appealed against the assessment. The Special
C Commissioners confirmed the assessment after holding that the compensation payment did not qualify for tax exemption under para 21 of Sch 6 to the Act.

Learned counsel for the appellant contends that the compensation payment is income from an employment by virtue of s 13(1)(e) of the Act.
D Since the period of employment was exercised by the appellant in Malaysia for 44 days (which is less than 60 days) and the appellant was at all material times a non-resident, the income from that employment must necessarily be for the same period, namely 44 days, and accordingly, the appellant therefore qualified for tax exemption under para 21 of Sch 6.

E Learned counsel for the respondent, in support of the Special Commissioners' decision, argued that the compensation payment of RM700,000 is not an income from an employment exercised by the appellant in Malaysia. Thus, para 21 of Sch 6 is not applicable.

In order to resolve this issue, I consider it necessary to reproduce s 127
F and para 21 of Sch 6 to the Act which state:

PART IX

EXEMPTIONS, REMISSIONS AND OTHER RELIEF

127 Exemptions from tax: general

G (1) Notwithstanding any other provision of this Act, any income specified in Part I Sch 6 shall, subject to this section, be exempt from tax.

SCHEDULE 6

(Section 127)

EXEMPTIONS FROM TAX

H

Part 1

INCOME WHICH IS EXEMPT

21 Subject to para 22, the income of an individual from an employment exercised by him in Malaysia —

I (a) in the basis year for a year of assessment, for a period or periods which together do not exceed 60 days; ...

if he is not resident for that basis year or for each of those basis years, as the case may be.

It is to be noted that para 22 of Sch 6 is not relevant for consideration in this case as it concerns the income of an individual from an employment in Malaysia for a period of more than 60 days in a basis year or the income exercised by a public entertainer. Since the appellant was in Malaysia for less than 60 days, the provision is therefore not relevant.

In my judgment, the decision of the Special Commissioners is correct in law. The Special Commissioners found as a firm finding of fact that the compensation payment was not an income from the employment exercised by the appellant in Malaysia. The purpose of para 21 of Sch 6 is to allow a non-resident individual to enjoy tax exemption on income which is: (i) from an employment exercised by him while in Malaysia, and (ii) for a period or periods which together do not exceed 60 days in the basis year. In this respect, I agree with Special Commissioner Toong Chooi Poh's view that in order to qualify for tax exemption under para 21, the compensation payment in the instant case has to satisfy two conditions: first, it must be income from an employment exercised by the appellant while in Malaysia and, secondly, it must also be income for a period or periods which together did not exceed 60 days in the basis year 1989. The expression 'for a period or periods which together do not exceed 60 days' appearing in para 21 relates not only to the appellant's period of employment, but also to the appellant's income. Thus, the important question to ask is whether the compensation payment itself was income 'for a period or periods which together do not exceed 60 days' in that basis year. While it is true that the compensation payment of RM700,000 is income from an employment made under s 13(1)(e) of the Act, the payment cannot be construed as income from employment for 44 days in 1989 because the appellant was actually exercising employment on an agreed salary of RM72,500 per month. The compensation payment which represented the equivalent of nearly ten month's salary was paid to the appellant as compensation for the premature termination of his employment on 15 October 1989 which would otherwise have carried on for at least the next 22½ months since he had a real prospect of continued employment under the terms of his employment. The compensation payment, being compensation for loss of employment, cannot be made in respect of employment or in respect of having or exercising the employment. The two things are mutually exclusive. Viscount Dilhorne in the Privy Council appeal from Malaysia in the case of *H v Comptroller of Inland Revenue* [1974] 2 MLJ 135 at p 138 said:

> A payment made as compensation for loss of employment cannot be made in respect of employment or in respect of having or exercising the employment. The two things are mutually exclusive.

It follows, therefore, that the compensation payment was not income which qualified for tax exemption under para 21. The appellant could of course claim for tax exemption under para 21 in respect of income actually earned from the employment exercised by him for the period of 44 days in 1989, but this situation would not arise since he was in fact not paid any salary for that period, and thus, there was no income as such to be exempted from tax under the provision.

A For the above reasons, I hold that the contention of the appellant is misconceived and devoid of merit whatsoever. Accordingly, I affirm the deciding order of the Special Commissioners and dismiss the appeal with costs.

Appeal dismissed with costs.

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Reported by Loo Lai Mee

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